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Online gambling : the German Constitutional court paves way for German ECJ gaming case

17 Mai 2005

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The German Constitutional Court recently issued an important decision concerning the legality of intermediary activities for a Gibraltar licensed gaming operator. Seen the Gambelli judgment of the European Court of Justice (ECJ) and its reception by national courts, the German Constitutional Court, Bundesverfassungsgericht, raised substantial doubts on the compliance of the German cross-border gaming restrictions, notably article 284 StGB – Criminal code, and the requirements of European law.

In line with the Gambelli and Lindman decisions, the Bundesverfassungsgericht stressed the need to have an in concreto analysis of the compliance of these national restrictions. In Lindman, the European Court of Justice (ECJ) held that Member states have to prove with statistical or other evidence, that the national restrictions on the cross-border provision of games meet the requirements of European law.

Furthermore and as the German Bundesgerichtshof (BGH) in April 2004, the Constitutional Court made particular reference to the decision of the Landgericht München I of 27 October 2003. In this decision, the Landgericht held that the organisation of sports bets and lotteries was subject to a monopoly. However, this monopoly was not adopted and maintained for reasons of public order, but mostly for tax reasons. For this reason, the court stated it would not be justified to impose to an Austrian licensed bookmaker an obligation to obtain an additional German license.

Eventually, it stated that it is almost impossible for a national court to answer the compliancy of the restrictions imposed with European law without referring the case to the ECJ. Based upon this statement, one can expect that there will soon be a German Gambelli III case pending before the ECJ in Luxembourg.

In addition, the German Constitutional Court will soon issue another important ruling in a case relating to the freedom to exercise a profession and bring some fundamental clarifications to the current German gaming policy.

Even though this debate is focused on article 12 of the German Constitution, i.e., the freedom to exercise a profession, for instance, act as an intermediary for a foreign gaming provider, the fundamental question is very similar to the one relating to the provision and promotion of gaming services across borders. One should only be allowed to restrict this freedom, provided that the German gaming policy is consistent and when the so-called reasons of public order justifying the restrictions are not merely used to protect the German gaming market from foreign competition. In this view, the aggressive commercial behaviour of State lotteries and Oddset, one of the six official suppliers of the 2006 World Cup, can be criticized. In line with the February 2004 decision of the High Administrative Court of Hessen and the December 2004 decision of the Landgericht of Baden-Baden, some other courts have already held that the German gaming policy did not meet the required justifications imposed by the EC Treaty and the jurisprudence of the European Court of Justice.

For the time being and with its landmark decision still pending, the Constitutional Court asked local authorities to act prudent and refrain from too restrictive actions against local intermediaries. In conclusion, it will become very difficult for German authorities to enforce criminal restrictions and protect the German market from foreign competition.

The decision of the court is available [on this website](#).